



# Utah Sentencing Commission

## SUBCOMMITTEE NOTES & VOTES

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At the Utah Sentencing Commission's Annual Meeting on April 6, 2016, the following subcommittees were approved to actively develop recommendations, guidelines and/or legislation consistent with the statutory charge of the USC in §63M-7-404, Utah Code Annotated, 2015:

- Juvenile Justice Subcommittee  
-Pam Vickrey, Chair
- Misdemeanor Subcommittee  
-Judge McCullagh, Chair
- Adult Sentencing & Release Guidelines Subcommittee  
-Chyleen Arbon, Chair
- Anomalies Subcommittee  
-Paul Boyden & Patrick Anderson, Co-Chairs

### ANOMALIES SUBCOMMITTEE

#### anomaly

noun US /əˈnɑːməˈli/

› something that is unusual enough to be noticeable or seem strange

› a person or thing that is different from what is usual, or not in agreement with something else and therefore not satisfactory

*Cambridge Academic Content Dictionary © Cambridge University Press*

The Anomalies Subcommittee addresses a wide range of various legislative items which cannot be easily categorized or labeled. The Anomalies Subcommittee analyzes Utah Caselaw, Code, and Common Law in order to identify "anomalies" which may exist and to make recommendations in order to address them. In 2015, the major issue identified and addressed by the Anomalies Subcommittee was the issue identified in State v. Poole, 2015 Ut App 220. HB 404 was a collaborative effort of Representative Wilson, Senator Hillyard, Office of Crime Victims

and the Sentencing Commission which ultimately included the revisions proposed by the Anomalies Subcommittee. HB 404 addresses the inequality for a victim of crime which was previously dependent upon whether the placement of an offender on probation as opposed to commitment to prison. HB 404 expands the notice requirements to victims for restitution requests and establishes a process for restitution determinations by both the Court or the Board of Pardons and Parole.

The first meeting of the Anomalies Subcommittee was held on April 29, 2016 in the Olmsted Room of the Senate Building. In attendance were: Paul Boyden (SWAP), Patrick Corum for Patrick Anderson (SLLDA), Judge Vernice Trease (3<sup>rd</sup> District Court), James Swink (UDCAA), Mike Haddon (UDOC), Representative Brian King (Utah House of Rep.), Susan Allred (Leg. Research), Doreen Weyland (CCJJ JRI ITF), Judge Michelle Christensen (Court of Appeals), Judge Brendan McCullagh (West Valley Justice Court - by phone), and Jennifer Valencia. Specific items discussed are listed below under either 2016 legislation which did not pass or additional items identified by the USC. References to all items discussed during the USC Annual Meeting can be located on the

## 2016 Legislative Bills Which Did Not Pass:

### **SB 107 Hate Crimes:**

Paul Boyden indicated that Senator Thatcher is likely to file the same bill next year which was advanced by Senator Urquhart last year. Unanimous support was expressed to continue to pursue this issue. It is currently included in the Guidelines as an aggravating factor, which would be removed if addressed statutorily to avoid double counting.

Assigned to the Anomalies Subcommittee by unanimous vote.

### **HB 19 Expungement**

#### **Amendments:**

Judge McCullagh indicated that there are concerns regarding BCI now fingerprinting all traffic offenses and there has been a massive influx of Class C's and infractions. Jennifer Valencia mentioned that the Board of Pardons and Parole would likely want to be included in this discussion, as there has been concern expressed that pardons are a more costly and cumbersome process than is warranted for less serious offenses. Unanimous support was expressed to continue drafting, although the intent may be different from Representative Green's intent in HB19.

Assigned to the Misdemeanor Subcommittee by unanimous vote.

### **HB 297 Bail Bond Amendments & SB 202 Pre-Trial Release**

#### **Amendments:**

Paul Boyden indicated that both bills should be developed by CCJJ first. Both bills have broader impact than sentencing and should be coordinated better next year with all interested stakeholders in advance. Jennifer Valencia and Doreen Weyland explained that

the County Performance Incentive Funding Grants (CPIF) through CCJJ JRI includes 3 priorities: A, B & C. Priority B is specifically for the development of a pre-trial tool, which has not been finalized by CCJJ. Judge McCullagh indicated that a permanent committee on Pre-Trial Practices is being established by the Judicial Council subsequent to the report issued last November. Paul Boyden indicated that Shima Baughman's PowerPoint at the Annual Meeting was very informative and should be circulated to CCJJ and other stakeholders. It is a lot of information and will require more education and information before it is fully understood.

Deferred to CCJJ by unanimous vote.

### **HB 465 Expungement Act**

#### **Amendments (Juvenile):**

Jennifer Valencia indicated that this bill appeared to be an exact copy of HB 19, but that there was some discussion it was intended to be a juvenile expungement bill. Pam Vickrey was not present, but presented on the issue of access to juvenile records at the Annual Meeting of the USC and a recent national report on expungement. James Swink expressed concern that the current expungement process for juveniles is more beneficial and was unsure whether any changes are actually needed. Patrick Corum, Jennifer Valencia and Judge McCullagh provided some context regarding a recent case which prompted concern regarding the release of juvenile records to the media.

Assigned to the Juvenile Justice Subcommittee by unanimous vote.

### **HB 475 Driver License**

#### **Amendments:**

State v Ainsworth is still pending appeal. Paul Boyden indicated that SWAP declined to pursue legislation this past session due to the pending appeal. He proposed SWAP and UCDA report back to the Anomalies Subcommittee on

the status of the appeal first. Members discussed whether Ainsworth addresses the issues in § 41-6a-517. Jennifer Valencia confirmed that Ainsworth held that § 58-37-8(2)(h)(i) (the measurable metabolite statute) is unconstitutional under the Uniform Operation of Laws provision of the Utah Constitution. HB 475 would have repealed § 41-6a-517 and provided for the use of interlock devices instead of a hard suspension of a driver license. Agreed to defer further action on § 41-6a-517 until USAAV's DUI Committee has had a chance to discuss this issue.

Assigned driver license issues to the Misdemeanor Subcommittee by unanimous vote.

Assigned supervision standards (77-18-1) general and earned compliance credits to the Guidelines Subcommittee by unanimous vote.

### **SB 189 Death Penalty**

#### **Amendments:**

Most recent fiscal impact analysis is from 2012. That information could be updated, but is likely fairly similar. The list of death row inmates could be updated, as could research, data and timeline for appeals. James Swink indicated that the death penalty is so rarely used in Utah that the cost issue is not especially concerning. Judge Trease and Patrick Corum expressed concerns regarding the costs associated with the filing of a death penalty eligible case as opposed to the actual imposition. Susan Allred indicated that the legislature will be discussing a proposal during the Interim Session from Senator Weiler to reduce the time period for the appeal process. There will likely be a presentation on some of these issues during Interim. Paul Boyden indicated that we can provide research and data, but ultimately it is policy decision for the legislature and our input may not be persuasive. He proposed that we wait until we are assigned

a specific task before moving forward.

Agreed to defer further action by unanimous vote.

### **HB 487 Criminal Code & Criminal Procedure**

#### **Amendments:**

Bill passed in the House, but ran out of time on the Senate Floor. CCJJ will likely coordinate further on this bill during Special Session in May 2016.

Agreed to defer further action until after the Special Session by unanimous vote.

### **Additional Issues Identified by USC:**

#### **Aggr. Kidnapping § 76-5-302:**

Patrick Corum explained that the concern (also previously mentioned during the Annual Meeting by Patrick Anderson) is that an aggravated conviction can be established without the underlying kidnapping offense having been proven (unlawful detention).

Assigned to the Anomalies Subcommittee by unanimous vote.

#### **Felony Theft § 76-6-412:**

Jennifer Valencia indicated that the concern which has been expressed is that a 3<sup>rd</sup> degree felony theft offense under § 76-6-412(1)(b) does not include a threshold amount for which an individual may be committed to prison (even if the third offense was for \$1.00). Although unlikely, there have been instances where prison was ordered in such a scenario. Paul Boyden indicated that he is also aware of a concern expressed that a 2<sup>nd</sup> degree theft could be charged under § 76-6-412(1)(iii) for shoplifting while carrying a concealed weapon with a permit. James Swink asked whether that charge has actually been filed anywhere other than Salt Lake and if so, how often is it being used. Jennifer Valencia

indicated she would send a request to the AOC as to the filings under that prong of the statute. A 2012 CCJJ Issue Paper entitled "Examining the Potential Deterrent Effects of Felony Theft Enhancements in Utah" and "Snapshot of Offenders in Prison Due to Felony Theft Enhancements in Utah" was distributed and discussed. The statute was also reviewed, including the reference to the definition of a dangerous weapon in § 76-1-601 (cross referenced in § 76-6-412(1)(iii)). It appears that even a facsimile would be sufficient under the statute. Most questioned whether that was the intent of the statute or would be the intent of the legislature currently.

Assigned to the Anomalies Subcommittee by unanimous vote.

#### **Strict Liability Juvenile Sex Off. § 76-5-402.1 & § 77-2-9(2):**

*In the Interest of T.S.* was discussed. Representative King inquired as to whether Representative Nelson's bill addressed this issue in the 2016 session. Paul Boyden explained that Representative Nelson's bill addressed 14 and 15 year old victims and a 4 year age difference (reduced from 7 to 4), but did not address rape of a child. Judge Christiansen explained that in this case, there was a 2 year 5 month age difference, but 2 years is the hard limit under § 77-2-9(2). None were aware of whether the 2 year limitation was simply an arbitrary number of whether it was based on any research and/or data on brain development in juveniles.

Assigned to the Juvenile Justice Subcommittee by unanimous vote.

#### **Criminal Accounts Receivable Recodification:**

The most recent draft which was prepared in January 2016 was circulated prior to the meeting. Judge McCullagh indicated that he met with SWAP and OCV prior to the session and thought the

concerns had been addressed in the most recent draft. Jennifer Valencia indicated that there were questions regarding any unintended consequences with such a major revision and/or recodification of an entire section regarding restitution and that there just wasn't enough time to vet all concerns during the session. The recodification would impact §§ 76-3-201, 76-3-201.1, 77-18-1, 77-32a-301, 77-32a-1 through 14, 77-38a-102, 78-32a-301 and 302, and 78B-6-317. This bill would require a bill file to be opened by legislative research as soon as possible due to its size and magnitude. Susan Allred mentioned that a legislative sponsor will be needed to open the bill file first.

Assigned to the Misdemeanor Subcommittee to draft and locate a sponsor by unanimous vote. Intended to be circulated widely and discussed with all stakeholders as a consensus bill.

#### **Amounts/weights in Drug Distribution Offenses:**

Jennifer Valencia indicated that Weber County has proposed revising the Sentencing Guidelines in several ways, including a mandatory minimum penalty for certain drug distribution or possession with intent offenses:

- 1 year for sched. I or II drug for 1-4 oz or 100-200 pills;
- 2 years for sched. I or II drug for 4-16 oz or 200-300 pills;
- 3 years for sched. I or II drug for 16+ oz or 300+ pills;
- 2 years if a firearm is used to facilitate any of the above.

No interest was expressed in pursuing legislation. Paul Boyden indicated that the issue of including amounts or weights was discussed during the 2014 Pew/CCJJ JRI process, but there was no consensus on the amounts. Prosecutors may want to discuss again.

Unanimous negative vote.

### Important Dates & Notices:

Any proposed legislation to be considered discussed at the June 1 meeting of the USC needs to be emailed to [jvalencia@utah.gov](mailto:jvalencia@utah.gov) on or before May 23, 2016 at 5:00 p.m.

Subcommittee Chairs should coordinate with Jennifer Valencia regarding attendance at additional meetings for purposes of collaborating with other entities.

The next meeting of the Anomalies Subcommittee is scheduled for **May 24, 2016 at 11:30 a.m.** Contact [jvalencia@utah.gov](mailto:jvalencia@utah.gov) for inclusion on mailing lists to stay up to date on the subcommittees' progress.

The remaining meetings of the full USC for 2016 are scheduled at **12:00 p.m. in the Senate Caucus Room** on the following dates:

- June 1
- August 3
- October 5
- December 7

## 2016 SENTENCING COMMISSION MEMBERS

**Peter Stirba, Chair**

*Citizen Representative*

**Judge Vernice Trease**

*District Court Judge*

**Patrick Anderson**

*Director, Salt Lake Legal Defenders*

**Paul Boyden**

*Executive Director, Statewide Association of Prosecutors*

**Scott Garrett**

*Juvenile Prosecutor*

**Susan Burke**

*Director, Juvenile Justice Services*

**Judge Julie Lund**

*Juvenile Court Judge*

**Chyleen Arbon**

*Board of Pardons and Parole*

**Rep. Brian King**

*Utah House of Representatives*

**Shima Baughman**

*Ethnic Representative*

**Ron Gordon**

*Executive Director, Commission on Criminal and Juvenile Justice*

**Judge Thomas Low**

*District Court Judge*

**Rich Mauro**

*Defense Attorney, Utah State Bar*

**Pamela Vickrey, Vice Chair**

*Juvenile Defense Attorney, Utah State Bar*

**Senator Gene Davis**

*Utah State Senate*

**Judge Mark Andrus**

*Juvenile Court Judge*

**Judge Michelle Christiansen**

*Utah Court of Appeals*

**Rollin Cook**

*Executive Director, Department of Corrections*

**Darin Carver**

*Adult Treatment*

**Christina Zidow**

*Juvenile Treatment*

**Chief Craig S. Black**

*Utah Chiefs of Police Association*

**Rep. Marc Roberts**

*Utah House of Representatives*

**Rachelle Hill**

*Victims' Representative*

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**Sheriff James Tracy**

*Utah Sheriff's Association*